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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-735

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner, Sears, Roebuck and Co., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in this case on September 14, 1979, upon remand from this Court in *Sears, Roebuck and Co.* v. *San Diego County District Council of Carpenters,* 436 U. S. 180 (1978).

OPINIONS BELOW

The opinion of the California Supreme Court is attached hereto as Appendix A and is reported at ..... Cal. 3rd ....., ... Cal. Rptr. ....., ... P. 2d ..... (1979). The opinion of this Court remanding this case to the California Supreme Court is reported at 436 U. S. 180 (1978). Prior thereto, the opinions in this case were an unreported opinion of the Califor-

nia Superior Court; an initial decision of the California Court of Appeal reported at 49 Cal. App. 3d 232, 122 Cal. Rptr. 449 (1975); an unreported order of the California Supreme Court retransferring the case back to the Court of Appeal; a subsequent opinion by the California Court of Appeal reported at 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975); and the first opinion of the California Supreme Court reported at 17 Cal. 3d 893, 132 Cal. Rptr. 443, 553 P. 2d 603 (1976).

JURISDICTION

The opinion and judgment of the Supreme Court of California issued on September 14, 1979. App. A and App. B. This judgment is final for purposes of review by this Court. *Market St. Railway Co.* v. *Railroad Comm.*, 324 U. S. 548, 551-52 (1944). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Is a state law, expressly designed to regulate labor-management relations, which makes lawful and unenjoinable unprotected union activity on private property, preempted by national labor policy?

2. Is a state law, which confiscates private property for a multitude of union activities, violative of that property owner's rights under the Fifth and Fourteenth Amendments?

3. Is the decision below in accord with this Court's remand of the instant case "for further proceedings not inconsistent" with its opinion (436 U. S. at 208)?

4. Is a state law, which withholds any remedy and precludes any employer self-help against unprotected union activity on private property, a denial of procedural due process?

STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant provisions of the Moscone Act, Cal. Code of Civ. Procedure § 527.3, and the California Penal Code, Cal. Code Ann. § 602, are set forth in Appendix C. Other relevant provisions are the Supremacy Clause (Article VI, Clause 2) and the Fifth and Fourteenth Amendments to the United States Constitution which are also set forth in Appendix C.

STATEMENT OF THE CASE

The facts which gave rise to this controversy are set forth in this Court's prior decision. 436 U. S. at 182-183. Upon remand for further proceedings not inconsistent with that opinion, the California Supreme Court again concluded, in an opinion by Justices Tobriner and Mosk and Chief Justice Bird, that the California courts lacked jurisdiction to enjoin the union picketing here at issue. App. A, pp. A1-A17. Justice Newman wrote a concurring opinion (App. A, p. A17), Justices Clark and Manuel a dissenting opinion (App. A, pp. A18-21), and Justice Richardson also issued a dissenting opinion (App. A, pp. A22-24).

The Court's majority opinion concluded that, as a result of the Moscone Act, Cal. Code of Civ. Proc. § 527.3, which was enacted while this case was on its initial appeal to the California Supreme Court, the picketing here at issue "constitute[d] an exception to the [California] criminal trespass statutes." App. A., p. A13, n. 9. The state courts were foreclosed, therefore, from enjoining that picketing and were required to find such conduct to be a "lawful activity." App. A, p. A4. This conclusion was premised on the view that "the decisions of the United States Supreme Court and of this court recognized that the State of California, by statute or by judicial decision may permit union activity on private premises." App. A, p. A11. Moreover, the majority concluded that since no

federal statute "confers on the employer an affirmative right to exclude union pickets . . . Sears can assert no claim based on the federal Constitution, statutes or cases which would require the California courts to enjoin the picketing in the present case." App. A., p. 16.

Other contentions raised by Sears were also rejected. The Court concluded that it was not required to follow the federal *N. L. R. B.* v. *Babcock & Wilcox,* 351 U. S. 105 (1956), criteria for permitting access on private property which "turns largely on the matter of availability of adequate alternative channels of communication," but was free to establish a rule "of more general applicability" which permits peaceful access in *every* case. App. A, pp. A12-A13. The Court additionally rejected the argument that, under the decisions of this Court in *Lloyd Corp.* v. *Tanner,* 407 U. S. 551 (1972), *Central Hardware Co.* v. *N. L. R. B.,* 407 U. S. 539 (1972), and *Scott Hudgens* v. *N. L. R. B.,* 424 U. S. 507 (1976), Sears had a federal Constitutional right to prohibit the picketing. It held that those decisions of this Court "did not involve a constitutionally protected right of property at all" and that since the purpose of the Moscone Act—"the elimination of unnecessary judicial intervention into labor disputes—indisputably bears a reasonable relationship to legitimate state objectives," that statute passes muster under the Fifth and Fourteenth Amendments. App. A, pp. A15-A16. Accordingly, the Court reversed the order granting a preliminary injunction.

REASONS FOR GRANTING THE WRIT

1. In its prior decision in this case, this Court addressed the *San Diego Bldg. Trades Council* v. *Garmon,* 359 U. S. 236 (1959), question of whether the Union's area standards picketing of Sears constituted conduct which was either arguably protected or arguably prohibited by the National Labor Relations Act, 29 U. S. C. § 151, *et seq.* If so, then the states were foreclosed from acting by the exclusive jurisdiction of the

National Labor Relations Board. This Court concluded, however, that the picketing was not encompassed by either branch of the *Garmon* doctrine: that (1) since the state court action challenged only the location of the picketing, rather than its objective, there was "no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices" (436 U. S. at 198) and (2) since the Union's picketing "would be unprotected in most instances" by federal law, "the assertion of state jurisdiction . . . does not create a significant risk of prohibition of protected conduct" (436 U. S. at 206-207). Indeed, the Union subsequently conceded before the California Supreme Court that its conduct was not protected by federal law. App. A, p. A3.

As a result, the case was remanded for the California Supreme Court to determine whether the injunction had been properly issued. In making that determination, however, the court was still required to consider the other "line of pre-emption analysis . . . unaffected" by this Court's prior decision: that there is "conduct which a State may not prohibit even though it is not covered by § 7 of the [Labor] Act." *Sears,* 436 U. S. at 199, n. 30; *See also Lodge 76 IAM* v. *Wisconsin Employment Rel. Comm.,* 427 U. S. 132, 138, 140-151 (1977). Congress has intended, as this Court recently made clear, that in certain situations notwithstanding that the conduct involved is neither protected nor prohibited by the Labor Act, "the exercise of state authority" would, nevertheless, "frustrate effective implementation of the policies" of that Act. *New York Telephone Co.* v. *New York State Dept. of Labor,* ..... U. S. ....., 99 S. Ct. 1328, 1336 (1979). This aspect of preemption has its "greatest force" where, as here, the state law involved is not a neutral "law of general applicability" but, instead, a law "regulating the relations between employees, their union and their employer." *Sears,* 436 U. S. at 193; *see also New York Telephone,* 99 S. Ct. at 1337-8, 1340-1.

The California Supreme Court's decision in this case was squarely premised on the Moscone Act, a state statute which, as stated by the court below, expressly "established the legality of certain labor practices and limits the equity jurisdiction of the superior courts to enjoin such practices." App. A, p. A4. The provisions of subdivision (b), the section deemed controlling here, apply only to "labor disputes"; picketing or communication for any other purpose is unaffected. *Id.* at A5-A6. Moreover, the California Supreme Court's analysis of subdivision (b) specifically weighed the "special interests of employers, union, or the public . . . in labor disputes (*Lodge 76, Machinists,* 427 U. S. at 156 (Powell, J., and Burger, C. J., concurring); see also Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1352, 1355-1356 (1972)). The Court, in balancing "the union's interest" against that of the property owner (App. A, pp. A7-A8, A11), held that it was not bound by the federal criteria, and relied solely upon California decisions which had granted "labor unions the right to conduct certain activities on private property" (*Id.* at A10). It then concluded that "subdivision (b) [of the Moscone Act], so construed, bars the injunction issued in the instant case." *Id.* at A12. The Court's opinion even foreclosed the exercise of self-help by an employer to eject pickets on the ground that since the picketing was "lawful", the employer "has no (such) right." *Id.* at A14-A15, n. 11.

The present case thus presents a significant question with respect to the permissible extent of a state's legislative power, directly aimed at labor objectives, to infringe upon federal labor policy. In contrast to *New York Telephone,* California here has directly sought to impose its own substantive regulation of labor-management relations. As in *Teamsters Union* v. *Morton,* 377 U. S. 252, 260 (1964), the "inevitable result [will] be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." This Court's prior decision permitted the

state courts to apply laws reflecting neutral public policies to determine the legality of the Union's entry on Sears' property. Such entry was to be considered no differently than any other trespass. The California Supreme Court, however, has instead "invoked a special remedy under a state labor law." *Sears,* 436 U. S. at 193, n. 22. It has held that "union activity which is authorized by state labor law constitutes an exception to the criminal trespass statutes." App. A, p. A13, n. 9. No reliance has been placed on any provision of generally applicable California law. *Id.* at A9-A10, n. 5. The question of whether this deliberate state regulation of bargaining relationships is a permissible intrusion upon the national labor policy is one which warrants resolution by this Court.[1]

2. In *PruneYard Shopping Center* v. *Robins,* No. 79-289, on appeal from the California Supreme Court, this Court has been asked to resolve the question of whether a State may require, notwithstanding the Fifth and Fourteenth Amendments, the "exercise [of] general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." (*Lloyd Corp.,* 407 U. S. at 568). The same confiscation of private property in derogation of paramount federal Constitutional rights has occurred in this case. As dissenting Justice Richardson observed below, in this case, as in *PruneYard,*

1. This issue is not, of course, confined to the factual setting of this case. Subsection (b) of the Moscone Act applies to a wide variety of union activities, *viz.,* "giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling . . . or by any other method not involving fraud, violence or breach of the peace[;] peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers[; or] assembling peaceably to do any of [these] acts . . . or to promote lawful interests." App. C, pp. A26-A28. All such activity is deemed lawful and unenjoinable "[i]rrespective of how controversial, offensive, distracting or extensive such conduct may be" (*Lloyd,* 407 U. S. at 564, n. 11) or that the accommodation between bargaining rights and property rights "may fall at different points along the spectrum depending on the nature and strength of the respective rights . . . asserted in any given context" (*Hudgens* v. *N. L. R. B.,* 424 U. S. 507, 526 (1976)).

"[w]here there are available other reasonable means of transmitting the union message, such trespassory activity must yield to the 'paramount federal constitutional imperative' protecting the property interests of the landowner." App. A, p. A24 (dissenting op.). A grant of the present petition would thus provide the Court with a desirable opportunity to resolve, in a different although equally compelling context, "arguments . . . [which] are necessarily identical." *Roe* v. *Wade*, 410 U. S. 113, 123 (1973).

3. In its prior decision in this case, this Court emphasized "the anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issue in those cases in which the disputed conduct is least likely to be protected by § 7 [of the Labor Act]." 436 U. S. at 206-207. That anomaly still exists. There is still no forum, federal or state, in which to litigate the merits of either issue. "The balance is struck", in the language of Justice Richardson's dissent below, "in advance and uniformly, in favor of trespassory labor activity whether or not reasonable alternative means of communication exist, and whether or not these activities involve only a 'temporary and minimal' yielding of the store owner's property rights." App. A, p. 24 (dissenting op.).

Under federal law, the burden imposed on a union to justify access on private property is a "heavy one" with the balance only "rarely being in favor of trespassory activity." *Sears*, 436 U. S. at 205. Such activity is "unprotected in most instances," particularly in the case of area standards picketing. *Ibid.* and n. 42. To obtain protection, the union must show "no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation." *Id.* at 205. Under the decision below, however, unions in California now have no such obligation. Protection has been automatically afforded by state law in *all* cases without any adjudication of the competing interests involved. This is clearly contrary to the law in other

jurisdictions. See, e.g., *People* v. *Bush*, 384 N. Y. 2d 733, 349 N. E. 2d 832 (1976); *May Dept. Stores* v. *Teamsters Local 743*, 64 Ill. 2d 153, 355 N. E. 2d 7 (1976). It also calls into question the validity under state law of federally permissible no-solicitation rules against non-employee activity on private property. See, e.g., *Babcock & Wilcox*, 351 U. S. at 112-113. And it surely turns this Court's prior *Sears* decision on its head; as the dissent in that case observed, the basic considerations underlying the Court's majority opinion were twofold: that the type of activity here involved was "more likely to be unprotected than protected," and that where an "argument in favor of protection is the strongest, the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum." 436 U. S. at 230-232 (dissenting op.). Now, however, the unprotected nature of the Union's picketing has been rendered immaterial for the State has declared all such activity to be "legal." Similarly, the Union has been able to avoid a state forum without any obligation to invoke Board jurisdiction or even justify its conduct under the *Babcock & Wilcox* standard. This serious dislocation of national labor policy requires corrective action by this Court.

4. California's refusal to allow any relief against unprotected union activity also raises serious procedural due process questions. The decision below not only prevents Sears from seeking "the protection of the State's trespass laws", it additionally precludes the Company from "forcefully evict[ing] the pickets." The only option remaining is to "permit the pickets to remain on its property." *Sears*, 436 U. S. at 202. Sears has thereby been left without any means to terminate the Union's unprotected activity. The employer has thus been deprived of "a significant property interest" (cf. *Fuentes* v. *Shevin*, 407 U. S. 67, 87 (1972)), the "right" as a "general rule" to "bar nonemployee union organizers from his property." *Sears*, 436 U. S. at 205. As this Court has repeatedly recognized, ". . . a statute or rule may be held constitutionally invalid as applied when it operates

to deprive an individual of a protected right . . ." *Boddie* v. *Connecticut,* 401 U. S. 371, 379 (1951). Where, as here, a State leaves serious losses inflicted by improper conduct "remediless . . . [the result is] to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law." *Truax* v. *Corrigan,* 257 U. S. 312, 330 (1921).

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SEARS, ROEBUCK & COMPANY, *Plaintiff and Respondent,* *vs.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, *Defendant and Appellant.*	L. A. 30562 Super. Ct. No. 347511

Defendant San Diego County District Council of Carpenters (union) appeals from an order granting a preliminary injunction restraining the union, its officers, agents, representatives and members, from picketing on the property of plaintiff Sears, Roebuck & Co. (Sears). In an earlier opinion (Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters (1976) 17 Cal. 3d 893), we held that the jurisdiction of the superior court to issue the injunction was preempted by the National Labor Relations Act (29 U. S. C. § 151 et seq.). The United States Supreme Court granted certiorari, reversed our decision on the issue of preemption, and remanded the cause to this court for resolution of the remaining legal issues. (Sears, Roebuck & Company v. San Diego County Dist. Council of Carperters (1978) 436 U. S. 180.)

While this case was pending on appeal, the Legislature enacted the Moscone Act, Code of Civil Procedure section 527.3, which limits the equity jurisdiction of superior courts in granting injunctions in cases involving labor disputes. The injunction issued by the superior court here banned picketing on the privately owned sidewalks surrounding the Sears Chula Vista store even though the picketing was peaceful and did not inter-

fere with access to the store. As we shall explain, the Moscone Act, interpreted in light of prior decisions of this court, declares such peaceful picketing to be legal and thus not subject to injunction. Rejecting Sears' contention that it enjoys a federally protected right to enjoin peaceful picketing on property it has opened to public use, we conclude that the trial court lacks jurisdiction to enjoin the picketing at issue here.

We described the factual setting of this case in our previous opinion at 17 Cal. 3d 893, 895-896; we summarize that description briefly here. The Sears Chula Vista store sits in the center of a large parking area. To protect Sears' refusal to agree either to have carpentry work performed by workers dispatched by the union or to adhere to the union's master agreement for use of carpenters, the union posted pickets on the privately owned sidewalks immediately surrounding the Sears store. "It is not disputed that at all times while they were on Sears' property the pickets conducted themselves in a peaceful and orderly fashion. The record discloses no acts of violence, threats of violence, or obstruction of traffic." (17 Cal. 3d at p. 896.)

When the union rejected Sears' request that the pickets be removed from Sears' property, the store sued and obtained a temporary restraining order. The union protested the order on the ground that although the injunction permitted picketing on the public sidewalks, 220 to 490 feet away from the store, such picketing was too distant for customers to read the pickets' signs. Nevertheless the superior court, on November 21, 1973, issued a preliminary injunction restraining the union, its officers, agents, representatives and members, from "carrying on picketing on the plaintiff's property."

On appeal, we reversed the order of the superior court. Finding that the picketing was both arguably protected activity under section 7 of the National Labor Relations Act, and arguably prohibited activity under section 8 of that act, we held that under San Diego Union v. Garmon (1959) 359 U. S. 236 the

National Labor Relations Board had primary jurisdiction over the controversy.

The United States Supreme Court granted certiorari. Limiting the *Garmon* doctrine, the high court indicated that the fact that conduct is arguably protected or prohibited by the National Labor Relations Act may not be sufficient to establish the primary jurisdiction of the NLRB unless the party harmed by that conduct enjoys a suitable means of presenting the issue to the board. (Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, *supra,* 436 U. S. 180, 198, 207.) Because the only issue Sears could frame before the board turns on whether the union engaged in improper recognitional picketing, a narrow issue not decisive of Sears' right to enjoin the picketing as a trespass, the court concluded that we had erred in holding the NLRB had primary jurisdiction over the controversy.

The Supreme Court remanded the cause to us for further consideration. Its opinion identified one issue for resolution here; in footnote 8, the Supreme Court's opinion observes that: "The State Superior Court and Court of Appeal concluded that the Union's activity violated state law. Because it concluded that the state courts lacked jurisdiction to entertain the state trespass claim, the California Supreme Court did not address the merits of the lower court rulings. The Union contends that those rulings were incorrect. Though we regard the state-law issue as foreclosed in this Court, there is of course nothing in our decision on the pre-emption issue which bars consideration of the Union's arguments by the California Supreme Court on remand." (436 U. S. at p. 185.)[1]

1. The Supreme Court decision also left unresolved the issue whether the union's activity was not merely arguably protected by federal law, as we held in the first *Sears* opinion, but in fact protected by that law. If in fact the union's activity was protected, then clearly state courts cannot enjoin it. The union, however, in its supplemental brief, expressly disclaims any intention to contend here that its picketing was protected conduct under federal labor law.

By supplemental brief, the union calls to our attention a second issue. The Moscone Act (Code Civ. Proc., § 527.3), enacted in 1975, establishes the legality of certain labor practices and limits the equity jurisdiction of the superior court to enjoin such practices. Although the Legislature passed this act subsequent to the grant of the preliminary injunction in the case at bar, the parties recognize that "relief by injunction operates in future, and the right to it must be determined as of the date of decision by an appellate court." (American Fruit Growers v. Parker (1943) 22 Cal. 2d 513, 515; see Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 306 and cases there cited.) Accordingly, if the superior court lacks jurisdiction to enjoin the union's conduct under current section 527.3, the injunction previously issued must be reversed.

In the instant case the two issues before us—the lawfulness of the picketing under prior California law and the power of the superior court to enjoin it under section 527.3—coalesce into one. Although the reach of the Moscone Act may in some respects be unclear, its language leaves no doubt but that the Legislature intended to insulate from the court's injunctive power all union activity which, under prior California decisions, has been declared to be *"lawful activity."* Since, as we shall explain, we find that the picketing at issue here is clearly "lawful" under prior California law, it follows that under the Moscone Act the superior court lacks the power to enjoin that picketing.

The Moscone Act was a compromise measure. The original bill, drafted by union attorneys, clearly sought to limit the injunctive jurisdiction of the superior court. The act declared its purpose expressly: to prevent "the evils which frequently occur when courts interfere with the normal process of dispute resolution between employers and recognized employee organizations." (Code Civ. Proc., § 527.3, subd. (a).)[2] The Legislature

2. The preamble to the Moscone Act identifies the procedural inequities which occur when the courts issue injunctions in labor disputes. It states:

(Footnote continued on next page.)

amended the bill to add provisions proposed by management supporters without, however, deleting any of the original provisions. In section 527.3 as finally enacted, the provisions added by amendment strike a discordant stance from those surviving from the original draft, thus creating difficult problems of statutory interpretation.

The issue in the present case involves primarily the interpretation of subdivision (b), one of the provisions remaining from the original draft. This subdivision provides as follows:

"The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in

(Footnote continued from preceding page.)

"In the interpretation and application of this act the public policy of this state is declared as follows:

"Under prevailing economic conditions the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor and thereby to obtain acceptable terms and conditions of employment. It is therefore necessary that he have full freedom of association and self-organization and the right to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection.

"Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, is peculiarly subject to abuse in labor litigation for each of the following reasons:

"(a) The status quo cannot be maintained, but is necessarily altered by the injunction.

"(b) The determination of issues of veracity and of probability of fact from the affidavits of the opposing parties which are contradictory and, under the circumstances, untrustworthy rather than from oral examination in open court, is subject to grave error.

"(c) The error in issuing the injunctive relief is usually irreparable to the opposing party.

"(d) The delay incident to the normal course of appellate procedure frequently makes ultimate correction of error in law or in fact unavailing in the particular case." Stats. 1975, ch. 1156, p. 2845, § 1.)

specific or general terms, prohibits any person or persons, whether singly or in concert, from doing any of the following:

"(1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.

"(2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.

"(3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests."

The language of this subdivision, although broad and sweeping in scope and purpose, leaves some doubt respecting its application to the present context. Subpart (2) of the subdivision appears to declare "peaceful picketing" to be legal, and thus not subject to injunction, without regard to the location of the picketing; subpart (1), however, declares picketing "not involving fraud, violence or breach of the peace" legal only if it occurs in "any public street or any place where any person or persons may lawfully be." The act does not define this latter phrase. It is suggested that the statutory language cannot be taken literally; a strict reading might appear to authorize picketing in the aisles of the Sears store or even in the private offices of its executives. Arguably, at some such point even peaceful picketing might represent so intrusive an invasion of Sears' use of its property as to compel judicial intervention.

We need not define the precise meaning of subdivision (b) to resolve this present case. Although, as we have seen, the language of subdivision (b) standing alone does not define whether the acts prohibits an injunction against picketing in the context of this case, the concluding clause of subdivision (a) offers a guide to the construction of subdivision (b) and

clarifies this issue.[3] That clause provides that "the provisions of subdivision (b) . . . shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes."[4] As we shall demonstrate, "existing law," as set out in prior decisions of this court, establishes that peaceful picketing on privately owned walks outside the employer's store is not subject to injunction; those decisions also explain that judicial intervention in such a case is "unnecessary" to protect substantial rights of the employer.

In Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union (1964), 61 Cal. 2d 766 (Schwartz-Torrance), the superior court enjoined a union from stationing pickets outside the entrance of a bakery on property owned by plaintiff shopping center. On appeal, we stated that the validity of the injunction turned upon a balancing of the union's interest in peaceful picketing for a lawful purpose against the plaintiff's interest in the use and possession of its property.

The union's interest we first noted, rests upon both state policy favoring concerted activities of employees (61 Cal. 2d at p. 769; see Lab. Code, § 923; Messner v. Journeymen Barbers etc. International Union (1960), 53 Cal. 2d 873, 882) and upon principles protecting free speech (61 Cal. 2d at p. 770; see Hughes v. Superior Court (1948), 32 Cal. 2d 850, 854).

3. Subdivision (a) of section 527.3 reads as follows: "In order to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations, the equity jurisdiction of the courts in cases involving or growing out of a labor dispute shall be no broader than as set forth in subdivision (b) of this section, and the provisions of subdivision (b) of this section shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes."

4. The phrase "in accordance with existing law governing labor disputes" in subdivision (a) was contained in the language added by amendment to the original draft of the Moscone Act.

Although plaintiff asserted a countervailing interest in the exclusive possession and enjoyment of its property, we noted that "Because of the public character of the shopping center, . . . the impairment of plaintiff's interest must be largely theoretical. . . . Plaintiff suffers no significant harm in the deprivation of absolute power to prohibit peaceful picketing upon property to which it has invited the entire public." (61 Cal. 2d at p. 771.) We therefore found that the interest of the union in peaceful picketing outweighed the property right of the center, and reversed the injunction.

We concluded our opinion in the following language: "[T]he picketing in the present case cannot be adjudged in the terms of absolute property rights; it must be considered as part of the law of labor relations, and a balance cast between the opposing interests of the union and the lessor of the shopping center. The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion: the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage." (61 Cal. 2d at pp. 774-775.)

In re Lane (1969) 71 Cal. 2d 872 (Lane), involved a grocery store situated within a privately owned parking area—a factual setting comparable to the present case. Petitioner Lane distributed hand bills on the private sidewalk outside the entrance to the store. He was arrested and convicted of violating city ordinances that prohibited remaining on another's property after being notified by the owner to leave and of distributing handbills on private property without the owner's consent. Relying both on federal free speech guarantees as set out in the *Logan Valley* case (Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza (1968), 391 U. S. 308) and state labor policy as established in *Schwartz-Torrance,* we ordered petitioner's release. In language fully applicable to the

instant case, we explained that "If we were to hold the particular sidewalk area to be 'off limits' for the exercise of First Amendment rights in effect we would be saying that by erecting a *'cordon sanitaire'* around its store, [the store] has succeeded in immunizing itself from on-the-spot public criticism." (71 Cal. 2d 872, 876.) In 1970 this court, in its first opinion in Diamond v. Bland (1970), 3 Cal. 3d 653 (Diamond I) applied First Amendment principles as expounded in *Logan Valley* to hold that persons may circulate initiative petitions on shopping center property even though the challenged activity did not involve a labor dispute.

Thus until 1972, decisions of this court and the United States Supreme Court had moved steadily toward the protection of the exercise of free speech upon private business property open to the public. In that year, however, the Supreme Court changed its views on the scope of the First Amendment's embrace of speech on private premises open to the public. In Lloyd Corp. v. Tanner (1972), 407 U. S. 551, the Supreme Court rejected the reasoning of *Logan Valley,* decreeing that leafleting on shopping center property, which did not relate to any purpose contemplated by the center, found no First Amendment protection. A companion case, Central Hardware Co. v. NLRB (1972) 407 U. S. 539, held that a union enjoyed no constitutional right to conduct organizational picketing in the employer's parking lot. Finally in Hudgens v. NLRB (1975), 424 U. S. 507 the Supreme Court expressly overruled *Logan Valley* and held that the First Amendment does not protect picketing on shopping center property.[5]

5. Following the Supreme Court decisions in *Lloyd* and *Central Hardware,* the trial court in *Diamond* v. *Bland* vacated the injunction restraining the shopping center from interfering with the circulation of initiative petitions. On appeal, a majority of this court affirmed the trial court action, holding that under the federal decisions the First Amendment did not protect petitioners' activities on the shopping center property. (Diamond v. Bland (1974) 11 Cal. 3d 331 (Diamond II).) Our decision also rejected petitioners' con-

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Regardless of any claim of constitutional right, however, both the United States Supreme Court and this court have consistently recognized that federal or state labor law may grant unions rights to conduct activities on the employer's property. In both Hudgens v. NLRB, supra, 424 U. S. 507 and Central Hardware Co. v. NLRB, supra, 407 U. S. 539, the high court's holding that the First Amendment did not protect the union's picketing was not dispositive of the case; instead the court remanded the case to the NLRB to determine whether the union had a right to picket under NLRB v. Babcock & Wilcox Co. (1956) 351 U. S. 105, a decision interpreting federal labor law. In *Hudgens* the court observed expressly that "statutory or common law may in some situations extend protection . . . against a private corporation . . . who seeks to abridge the free expression of others. . . ." (424 U. S. at p. 513.)

The decisions of this court also recognize that statutes and judicial decisions may grant labor unions the right to conduct certain activities on private property. In *Diamond II*, when this court relied on the federal cases to reject the claim of constitutional right by persons circulating initiative petitions, our decision did not overrule either *Schwartz-Torrance* or *Lane;* we distinguished both cases on the ground that "labor unions had a labor dispute with, and were picketing businesses located within the shopping centers . . . a factor which led us to strike the balance between private property rights and First Amendment activities in favor of the latter." (11 Cal. 3d at p. 334, fn. 3.) Subsequently in Agricultural Labor Relations Bd. v. Superior Court (1976), 16 Cal. 3d 392, we held that state statutory and administrative law could authorize union access and organizing on a private employer's property.[6]

In summary, the decisions of the United States Supreme Court and of this Court recognize that the State of California, by statute or by judicial decision, may permit union activity on private premises. Our earlier decisions in *Schwartz-Torrance* and *Lane*—rulings which have not been overruled or eroded in later cases—established the legality of union picketing on private sidewalks outside a store as a matter of state labor law. Those decisions explained further that judicial action to bar such picketing was unnecessary; because the interest of the landowner was but a "thin" and "technical interest" (*Schwartz-Torrance,* 61 Cal. 2d at pp. 771, 775), an injunction against such picketing could not be deemed essential to prevent a substantial impairment of property rights.

As we noted earlier, subdivision (a) of the Moscone Act requires the anti-injunction provisions of subdivision (b) to "be strictly construed in accordance wih existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes." We believe that this langauge requires us to construe subdivision (b) in accord with the holding on *Schwartz-Torrance* and *Lane* of the legality of peaceful picketing on private walkways outside a store, and of the lack of necessity of judicial interference to protect any

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tention that the state Constitution authorized them to circulate petitions at the shopping center; construing *Lloyd* and *Central Hardware* as holding that the center enjoyed a federal constitutional right of property to exclude petitioners, we concluded that such federal right would prevail over any state constitutional right. (See 11 Cal. 3d at p. 335, fn. 4.)

Recently we reconsidered the question of the rights of the property owner, and concluded that *Lloyd* and *Central Hardware* did not confer on the shopping center a federal constitutional right to eject persons who are circulating petitions. Overruling *Diamond II,* we held that article I, sections 2 and 3 of the California Constitution protects the circulation of petitions on shopping center property. (Robins v. Pruneyard Shopping Center (1979) ..... Cal. 3d ....., ...)

The *Robins* decision rests on provisions of the California Constitution. In the instant case, our decision rests on the terms of Code of Civil Procedure section 527.3; accordingly we express no opinion on whether the California Constitution protects the picketing here at issue.

6. The United States Supreme Court dismissed an appeal in this case for want of a substantial federal question. (97 Sup. Ct. pp. 33-34.) The court regards such action as a decision on the merits. (Hicks v. Miranda (1975) 422 U. S. 332.)

substantial right of the landowner. We conclude that subdivision (b), so construed, bars the injunction issued in the instant case.

Sears argues, however, that subdivision (a)'s reference to "existing law governing labor disputes" refers not only to *Schwartz- Torrance* and *Lane,* but also to the United States Supreme Court decisions in Hudgens v. NLRB, supra, 424 U. S. 507, Central Hardware Co. v. NLRB supra, 407 U. S. 539, and Lloyd Corp. v. Tanner, supra, 407 U. S. 551. As we explained in Robins v. Pruneyard Shopping Center, supra, ... Cal. 3d ....., those Supreme Court decisions hold merely that the action of the landowner in ejecting persons from his property did not constitute state action under the Fourteenth Amendment—an issue irrelevant to the present case. The cited decisions do not establish rules of law "governing labor disputes."

Since both *Hudgens* and *Central Hardware* remanded actions to the NLRB for reconsideration under NLRB v. Babcock & Wilcox Co., supra, 351 U. S. 105, we might view Sears' argument as a contention that subdivision (a) incorporates into California law the *Babcock & Wilcox* doctrine under which a union's right to conduct activities on the employer's premises turns largely on the matter of the availability of adequate alternative channels of communication. That doctrine, however, rests on language of the National Labor Relations Act (29 U. S. C. § 151 et seq.) defining certain employer actions as unfair labor practices;[7] and as we have seen, California courts have never followed the *Babcock & Wilcox* doctrine requiring a case-by-case determination, but have established rules of more general applicability. (See *Schwartz-Torrance;* cf. Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal. 3d 392, 409.)

7. The *Babcock & Wilcox* doctrine is not a rule of constitutional law binding upon the states. (Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal. 3d 392, 409.)

In commanding the courts to construe subdivision (b) of section 527.3 in accord with "existing law governing labor disputes," the Legislature we believe, intended the courts to continue to follow principles of California labor law extant at the time of the enactment of section 527.3.[8] We do not surmise that the Legislature intended the courts to abandon such principles in favor of federal rules, such as the *Babcock & Wilcox* doctrine, which rest upon a statutory and administrative basis not found in California law.

Sears further contends that injunctive relief against the union's alleged trespass is authorized by subdivision (e), one of the provisions added by amendment to the Moscone Act. Subdivision (e) provides that "It is not the intent of this section [section 527.3] to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." We find this subdivision inapposite, for two reasons. First, the picketing in the instant case, by reason of the decisions of this court in *Schwartz-Torrance* and *Lane* and the express language of subdivision (b) of the act, is lawful conduct so long as it does not involve fraud, violence, or breach of the peace.[9] Second, under the

8. In requiring that subdivision (b) be construed in accord with existing law governing labor disputes, subdivision (a) states that such construction should serve "the purpose of avoiding any unnecessary judicial interference in labor disputes." Consequently if, as the preamble to section 527.3 suggests, existing law permits certain unnecessary judicial interference, the language of subdivision (a) does not preclude the courts from construing subdivision (b) to avoid such interference in the future.

9. The parties dispute whether the picketing in the instant case constituted a criminal trespass under subdivisions (j), (k), or (*l*) of Penal Code section 602. We think it unnecessary to embark upon a detailed analysis of that section, for union activity which is authorized by state labor law constitutes an exception to the criminal trespass statutes. (See Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal. 3d 392, 421; *Lane,* supra, 71 Cal. 2d 872 (city trespass ordinance); cf. In re Zerbe (1964) 60 Cal. 2d 666

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canon of construction known as *ejusdem generis,*[10] subdivision (e)'s reference to "conduct that is unlawful" must be limited to conduct which constitutes breach of the peace, disorderly conduct, the blocking of access or egress, or other "similar unlawful activity." Peaceful picketing on private sidewalks because it does not involve violence or substantially impair the rights of others, is not conduct "similar" to the listed acts.[11]

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(construing Pen. Code, § 552.1.) In any event, the language of subdivision (b) of section 527.3 is explicit: union activity protected by that subdivision is not only not subject to injunction but "shall be legal," language which precludes any ruling that such activity constituted a criminal trespass. As a specific statute regulating labor disputes, section 527.3 would prevail over the earlier and more general criminal trespass laws. (See Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal. 3d 392, 420.)

At oral argument the parties called our attention to an amendment to Penal Code section 602, subdivision (n). Under that amendment, effective January 1, 1979, a person does not violate subdivision (n) by refusing to leave property on the request of the owner, his agent, or the lawful possessor of the property, if the person is "engaged in lawful labor union activities which are permitted to be carried out on the property by the California Agricultural Labor Relations Act . . . or by the National Labor Relations Act." The parties recognize that this amendment merely codifies existing law; indeed union activity protected by state or federal labor law clearly does not violate any subdivision of Penal Code section 602.

10. "[T]he doctrine of *ejusdem generis* (also known as Lord Tenterden's rule) . . . states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage." (Scally v. Pacific Gas & Electric Co. (1972) 23 Cal. App. 3d 806, 819; see Civ. Code, § 3534 ("Particular expressions qualify those which are general"); In re Johnson (1914) 167 Cal. 142.)

11. Sears argues that trespassory picketing involves a potential of violence (see Sears Roebuck & Co. v. San Diego Dist. Council of Carpenters, supra, 436 U. S. 180, 213 (conc. opn. of Powell, J.)); and that "acts . . . likely to produce violence in others" may constitute a breach of the peace (In re Brown (1973) 9 Cal. 3d 612. 617). This argument appears to be based on the assumption that

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We turn to Sears' contention that it has a federally protected right to enjoin picketing on its property which prevails over contrary state law. Sears first maintains that it enjoys such a right under the due process clause of the Fourteenth Amendment, citing for that proposition the Supreme Court decisions previously discussed in Lloyd Corp. v. Tanner, supra, 407 U. S. 551; Central Hardware Co. v. NLRB, supra, 407 U. S. 539; and Hudgens v. NLRB, supra, 424 U. S. 507. We concluded in Robins v. Pruneyard Shopping Center, supra, ... Cal. 3d ....., however, that the cited decisions did not involve a constitutionally protected right of property at all, but were concerned solely with whether the action of the landowner constituted "state action" under the Fourteenth Amendment. Consequently those decisions offer no support for Sears' claim that it enjoys a federal right to enjoin picketing on its premises.[12]

The Fourteenth Amendment, of course, does protect Sears against any state statute which takes property without due process of law. A statute is invalid under the due process clause of the Fourteenth Amendment, however, only if it lacks a "real or substantial relation to the public health safety, morals or general welfare." (Miller v. Board of Public Works (1925) 195 Cal. 477, 490; Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 604; see Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal. 3d 392, 409-410.) The Moscone Act, although held to deny Sears the right to enjoin picketing on its premises under the facts of the instant case, is clearly valid under the foregoing standard; its purpose—the elimination of unnecessary judicial intervention

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the employer has and will exercise a right of self-help to eject the pickets. If the picketing is lawful, however, then the employer has no right to eject the pickets; the possibility that it may attempt to do so unlawfully and thereby precipitate violence is no basis for an injunction barring peaceful picketing.

12. Sears also asserts a constitutional right to access to the courts to enjoin illegal trespassing. (Cf. Boddie v. Connecticut (1971) 401 U. S. 371, 375-376.) The assertion falls with our holding that the union picketing at issue here is not illegal.

into labor disputes—indisputably bears a reasonable relationship to legitimate state objectives.

Finally, Sears argues that federal labor law grants it the right to bar union picketing on its premises under the circumstances of the instant case, and that such federal law must prevail over conflicting state statutes. Sears relies on NLRB v. Babcock & Wilcox, supra, 351 U. S. 105, which stated that an employer may validly post his property against nonemployee distribution of union literature if the employer does not discriminate against the union and the union has available channels of communication. (351 U. S. at p. 112.) *Babcock & Wilcox,* however, held nothing more than that an employer who adopts and enforces a nondiscriminatory no-solicitation rule does not commit an unfair labor practice. Nothing in the decision, or the federal statutes which it construes, confers on the employer an affirmative right to exclude union pickets unless such picketing constitutes an unfair labor practice. Sears does not contend here that the union picketing constituted an unfair labor practice and, in any event, such a contention must be raised before the National Labor Relations Board, not the state court. We therefore conclude that Sears can assert no claim based upon the federal Constitution, statutes, or cases which would require the California courts to enjoin the picketing in the present case.

In summary, the sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store. Recognized as lawful by the decisions of this court, such picketing likewise finds statutory sanction in the Moscone Act, and enjoys protection from injunction by the terms of that act. In such context the location of the store whether it is on the main street of the downtown section of the metropolitan area, in a suburban shopping center or in a parking lot, does not make any difference. Peaceful picketing outside the store, involving neither fraud, violence,

breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the courts.

The order granting a preliminary injunction is reversed.

TOBRINER, *J.*

We Concur:

BIRD. *C. J.*
MOSEK, *J.*

CONCURRING OPINION BY NEWMAN, J.

I agree that the injunction order should be reversed, and I concur in nearly all of Justice Tobriner's reasoning. He detects in the Moscone Act, however, certain ambiguities that to me do not seem to be confounding; and, unlike him, I do not believe that "the Legislature . . . intended the courts to continue to follow [all] principles of Califonria labor law extant at the time of the enactment of section 527.3." (Maj. opn., *ante,* at p. 19.)

NEWMAN, *J.*

DISSENTING OPINION BY CLARK, J.

I dissent.

I.

As pointed out in our earlier unanimous opinion in this case, picketing occurred only on Sears' parking lot areas immediately adjacent to walkways abutting the sides of the store building. (Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters (1976), 17 Cal. 3d 893, 896.) The record reveals that on at least one occasion, a picket stopped a car in the parking lot by stepping in front of it. No evidence exists of picketing on the walkways. Nevertheless, because the majority are determined to treat this case as if it involved picketing on a sidewalk, the dissent must address the issue.

II.

The Moscone Act expressly provides in Code of Civil Procedure section 527.3, subdivision (e): "It is not the intent of this section to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." Subdivision (a) provides that the provisions of subdivision (b)—dealing in part with picketing—are to be construed in accordance with "existing law." While this language may not have been part of the legislation as proposed, it is part of the legislation as enacted, and must be given effect by all—including this court. Conversely, the fact that the original proponents of the act sought to exempt certain union activity from criminal statutes, furnishes no justification

for refusing to enforce the clear legislative direction ultimately adopted.

The quoted language reinforced by legislative history makes clear that the Legislature in adopting the Moscone Act did not intend to exempt labor union conduct from existing criminal statutes. Indeed, it is difficult to see how the Legislature could have made its intent clearer. The majority's argument—that the Legislature intended to make exemptions to the trespass statutes by failing to expressly mention trespasses—must be rejected.

When the Legislature has sought to exempt labor union conduct from trespass statutes (e.g., Pen. Code, § 602), it has indicated both the conduct and property to be exempted (Pen. Code §§ 552-555.5, 602, subd. (n); In re Zerbe (1964) 60 Cal. 2d 666, 668 et seq.), or has authorized an administrative agency to adopt rules specifying the exempt property and conduct (Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 426-429). In contrast to the above statutes, the Moscone Act clearly expresses no intent to make exemptions to existing criminal law. Obviously, absent legislative authorization, this court is not free to adopt exceptions to criminal statutes for favored groups.

Endeavoring to find in the Moscone Act an exemption from trespass statutes, the majority—relying on the act's reference to "existing law"—claim the reference includes two discredited decisions by this court. Both cases erroneously relied upon by the majority as declaring a right to picket on private walkways (Schwartz-Torrence Investment Corp. v. Bakery & Confectionery Workers' Union (1964) 61 Cal. 2d 766, and In re Lane (1969) 71 Cal. 2d 872) are premised on the ground that picketing on private property involves rights protected by the First Amendment. That doctrine has been repudicated.

In Hudgens v. N. L. R. B. (1976) 424 U. S. 507, the Supreme Court stated: " 'To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly dis-

regarding the constitutional basis on which private ownership of property rests in this country.' " (*Id.*, at p. 517.) Rejecting the claim that picketing on private property is entitled to constitutional protection, the court stated: "We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this."[1] (*Id.*, at p. 521.)

Because the foundations of *Schwartz-Torrence* and *Lane* have been repudiated, those cases either alone or in conjunction with the Moscone Act furnish no basis for establishing a right to picket on private property.[2]

While I agree generally with the majority that the Moscone Act prohibits injunctions against lawful picketing as determined by prior law, the statutory codification of judge-made law does not include decisions based on erroneous constitutional doctrines, subsequently repudiated by the courts.

In Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 814, this court considered the specific codification of the contributory negligence doctrine—a common law or judicially created rule. The *Li* majority stated: "it was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existng common law principles and definitions for

1. In *Hudgens* the court stressed: " '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " (Hudgens v. N. L. R. B., *supra,* 424 U. S. 507, 520.) Thus, if the First Amendment requires Sears to open its private property to pickets, it must open its private property to all who wish to exercise First Amendment rights including demonstrators, political candidates, handbill distributors, and business competitors.

2. Once we recognize that the constitutional bases of *Schwartz-Torrence* and *Lane* are repudiated, the cases must be repudiated in toto. Absent constitutional requirement or legislative direction, we simply may not make exceptions to criminal statutes.

purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution." On the basis of this analysis the majority concluded it was free to repudiate the codified contributory negligence rule in favor of what it deemed to be a correct, more equitable rule.[3]

As in *Li*, it may be assumed the Legislature when referring to "existing law" did not intend to freeze judicially declared law, especially when that law was based on erroneous constitutional doctrine.

Because the language of the act expressly demonstrates legislative intent not "to permit conduct that is unlawful," and because we have no authority to create exceptions from the cirminal trespass statutes, we may not authorize trespasses on private parking lots or private walkways.

The order granting preliminary injunctions should be affirmed.

CLARK, *J.*

I Concur:
MANUEL, *J.*

3. The Legislature, of course, is the proper governmental agency authorized to enact the laws of this state. If, however, in codifying judicially declared doctrine the Legislature intends to continue to recognize the judicial evolution of that doctrine then, as in *Li*, the courts may continue to develop and declare new concepts. They may do so, however, only because the Legislature intends that they do so. Should the Legislature express itself contrary to a judicially developed doctrine, courts are bound to give recognition to such expression of legislative intent.

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent. I agree with Justice Clark's dissenting position to the effect that the majority has misread and misconstrued the Moscone Act (Code Civ. Proc., § 527.3) in holding that the act divests our courts of their historic and traditional equity jurisdiction to enjoin trespassory labor activities occurring on private property. In addition, however, it should be noted that the majority's interpretation of the act renders it *unconstitutional* under controlling United States Supreme Court decisions which hold that a private store owner enjoys a *federal* constitutional right to reasonable protection from such trespassory invasions.

Thus, during an earlier stage of the very proceedings now before us, the United States Supreme Court expressly stated that "Experience with trespassory organizational solicitation by nonemployees is instructive. . . . While *Babcock* [Labor Board v. Babcock & Wilcox Co. (1956) 351 U. S. 105] indicates that an employer may not always bar nonemployee union organizers from his property, *his right to do so remains the general rule.* To gain access, *the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists* or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that *the balance struck* by the [National Labor Relations] Board and the courts under the *Babcock* accommodation principle *has rarely been in favor of trespassory organizational activity.*

[¶] Even on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, *it would be unprotected in most instances.*" (Sears, Roebuck & Co. v. Carpenters (1978) 436 U. S. 180, 205-206, italics added and fns. omitted; see also Hudgens v. NLRB (1976) 424 U. S. 507; Central Hardware Co. v. NLRB (1972) 407 U. S. 539, 544-547.)

Thus, the high court has instructed us in unmistakable terms that trespassory picketing of the nature involved herein is probably unlawful under federal standards. Yet the majority wholly ignores these standards in determining whether California courts have jurisdiction to enjoin such activity. It is uncontradicted that in the present case the union has failed to carry its burden, under *Babcock,* of showing a lack of reasonable alternative means of communicating its message. Nevertheless, the majority upholds the union's activities solely in reliance upon a provision of *state* law which purportedly permits them to flourish unabated.

The majority's holding assumes that the foregoing federal principle of accommodation freely may be modified, subordinated or even wholly ignored at the whim of state courts or legislators. According to the majority, this federal principle "rest[s] upon a statutory and administrative basis not found in California law." (*Ante,* p. ..... [maj opn., at p. 19].) On the contrary, the federal principle discussed in *Babcock, Central Hardware* and *Hudgens* clearly is solidly founded upon the *private property rights* of the store owner, which rights derive not from any capricious or evanescent state statute or administrative ruling, but rather upon the rock-solid footing of the Fifth and Fourteenth Amendments to the United States Constitution. The accommodation principle painstakingly developed by the United States Supreme Court strikes a careful balance between the legitimate interests of organized labor and the constitutionality derived property rights of the owner. The high court in *Babcock*

insisted that "Accommodation between the two [interests] must be obtained with as little destruction of one as is consistent with the maintenance of the other." (351 U. S. at p. 112.) Further, *Central Hardware* teaches that "the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, *and the 'yielding' of property rights it may require is both temporary and minimal.*" (407 U. S. at p. 545, italics added.)

In contrast with the Supreme Court's carefully circumscribed formulation, the majority interprets the Moscone Act as stripping from California courts any jurisdiction to apply the balancing test of the federal cases. The "balance" is struck, in advance and uniformly, in favor of trespassory labor activity whether or not reasonable alternative means of communication exist, and whether or not these activities involve only a "temporary and minimal" yielding of the store owner's property rights. As I have previously argued in a recent case involving similar federally protected rights of the private shopping center owner, the majority's sole reliance upon *state* statutory or constitutional provisions or policy is entirely misplaced. Where there are available other reasonable means of transmitting the union message, such trespassory activity must yield to the "paramount federal constitutional imperative" protecting the property interests of the landowner. (Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 916 (dis. opn.).)

I would affirm the order granting a preliminary injunction.

RICHARDSON, *J.*

I Concur:
CLARK, *J.*

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SEARS, ROEBUCK & COMPANY, *Plaintiff and Respondent,* *vs.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, *Defendant and Appellant.*	Appeal County San Diego Superior Court No. 347511

The above-entitled cause having been heretofore fully argued, and submitted, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the ORDER of the Superior Court of the County of San Diego in the above-entitled cause, granting a preliminary injunction is reversed.

I, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 14th day of September, 1979.

WITNESS *my hand and the seal of the Court, this* 15th *day of* October, 1979.

Clerk

(SEAL)

By .....
Deputy

G. E. Schneider

APPENDIX C

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 527.3 Labor Disputes; Jurisdiction of Court

(a) In order to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations, the equtiy jurisdiction of the courts in cases involving or growing out of a labor dispute shall be no broader than as set forth in subdivision (b) of this section, and the provisions of subdivision (b) of this section shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes.

(b) The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction, which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from doing any of the following:

(1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.

(2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.

(3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests.

(4) Except as provided in subparagraph (iv), for purposes of this section, "labor dispute" is defined as follows:

(i) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (a) between one or more employers or associations of employers and one or more employees or associations of employees; (b) between one or more employers or associations of employers and one or more employers or associations of employers; or (c) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" of "persons participating or interested" therein (as defined in subparagraph (ii).

(ii) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft. or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(iii) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(iv) The term "labor dispute" does not include a jurisdictional strike as defined in Section 1118 of the Labor Code.

(c) Nothing contained in this section shall be construed to alter or supersede the provisions of Chapter 1 of the 1975-76 Third Extraordinary Session[1], and to the extent of any conflict between the provisions of this act and that chapter, the provisions of the latter shall prevail.

(d) Nothing contained in this section shall be construed to alter the legal rights of public employees or their employers, nor shall this section alter the rights of parties to collective-bargaining agreements under the provisions of Section 1126 of the Labor Code.

(e) It is not the intent of this section to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity.

CALIFORNIA PENAL CODE

§ 602. Trespasses Constituting Misdemeanors; Enumeration

Every person who wilfully commits trespass by any of the following acts is guilty of a misdemeanor: * * *

(k) Posted lands. Entering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or entering upon uncultivated or unenclosed lands where signs forbidding trespass are displayed at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering such lands without the written permission of the owner of such land, his agent or of the person in lawful possession, and

(1) Refusing or failing to leave such lands immediately upon being requested by the owner of such land, his agent or by the person in lawful possession to leave such lands, or

(2) Tearing down, mutilating, or destroying any sign, signboard, or notice forbidding trespass or hunting on such lands, or

(3) Removing, injuring, unlocking, or tampering with any lock on any gate on or leading into such lands, or

(4) Discharging any firearm.

(1) Occupation. Entering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof.

UNITED STATES CONSTITUTION

Article VI, Section 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land, and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the Contrary notwithstanding

Fifth Amendment:

No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .